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No. 71-164

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

VIRGINIA STAGE LINES, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The purpose of this reply brief is to invite attention to the Government's breach of minimum forensic standards and the legitimate bounds of advocacy in its opposition to our Petition. In their brief in opposition, counsel for the Board have subscribed to:

1. A gross misstatement of the question presented, that is demonstrably without any support in the four corners of the record or the pages of the Board's decision, and is completely incompatible with both; and

2. A gross inversion of our position as set forth in the Petition, which, ignoring all that appears there,

attributes to us a "basic contention" that is constructed from whole cloth (Brief For The National Labor Relations Board In Opposition, p. 6).

It is patently incorrect to assert, as counsel for the Board do (Brief in Opposition, p. 2), that the question raised is whether the Act prohibited the discharge of "two drivers who refused to cross a picket line" to perform their assignments. There was not an iota of evidence adduced nor any suggestion in the undisputed record that the employees in question ever engaged in a "selective refusal" or any refusal "to cross a picket line" (*Id.*, p. 6)), as made clear in our Petition, which stands unrefuted.[1] Incongruously, Board counsel, in flat self-contradiction, admit that "[D]uring the strike both willingly drove . . . even though this required their crossing the Safeway drivers' picket lines" (Brief in Opposition, Resume of "The Board's Findings of Facts", p. 4).

The matter is laid completely at rest, if more were needed, by the nature of the remote analogy to which the Board resorted in its decision, which recites that the dischargees' action in "refusing to drive" certain bus runs on occasion was "equivalent" to "their respecting the picket lines" (Petition, p. 10). If by employing

[1] *Union Carbide Corp.* v. *National Labor Relations Board*, No. 70-200—in which, the Board contends, a "similar issue is presented" (Brief in Opposition, p. 2)—is wholly inapposite. In *Union Carbide* the Board found that on "the first day of the strike" the employees involved upon "finding pickets at the gate, . . . decided to turn back", and that they later informed the employer that "their absence from work was due" to this circumstance. 70 NLRB 1425. The Court of Appeals, on this basis, held that "nonstriking employees who refuse as a matter of principle to cross a picket line maintained by their fellow employees" qualified for the protection of the Act. *National Labor Relations Board* v. *Union Carbide Corp.*, 440 F.2d 54, 55 (C.A. 4, 1971).

an analogy, the nonrecord facts associated with the purely analogous situation may be substituted blandly for those in the case at hand, there remain no litigation heights which counsel for the Board could not scale with the aid of this new found technique.

In a similar flight of fancy, Board counsel state that our "basic contention" here is that the employees' "refusal to cross the lines to perform" assigned work "was an unprotected partial strike" and address their opposition argument to this canard (Brief in Opposition, p. 6). Neither in this Court (nor in our brief submitted to the court below, were that material) did we raise or rely upon such an argument, which not only would have no bearing on this case, but is precluded by all that is set forth in the Petition.

While so diverted, Board counsel have made no effort to meet the serious challenge in our Petition to the exercise by the Board of unauthorized powers, in handing down with no explication a landmark cease and desist order, that is without precedent in Board annals. Instead, counsel seek technical refuge in the claim that we "did not specifically raise this contention before the Board" and hence are estopped from doing so in this forum. (Brief in Opposition, p. 8) This unsupported assertion is likewise untrue. The contention of unwarranted regulatory interference with managerial prerogatives was raised most explicitly in Petitioner's Brief to the Trial Examiner, whose decision the Board adopted *in toto*.[2]

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[2] Apparently seeking the shelter of Section 10(e) of the Act ("No objection that has not been urged before the Board, its member agent, or agency, shall be considered by the court . . ."), Board counsel state:

> "Nor is review warranted of petitioner's further contention (Pet. 14-16) that the Board's order unduly impinges

With the Board's caseload reportedly at an alltime high, it is conceivable that its litigation staff may have confused the facts and issue in the case at bar with that in some other case arising under the Act. Whatever the nature of the disorientation, the representations to this Court advanced in the Board's opposition brief do not faithfully delineate the question presented, and thus impede consideration of the Petition on its merits, with the true issue to the fore. In these circumstances, the Board may wish to reassess its position, with a view to correcting the error committed.

Respectfully submitted,

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upon the employer's freedom to run his business. Petitioner did not specifically raise this contention before the Board. See *Marshall Field & Company* v. *National Labor Relations Board,* 318 U.S. 253, 255."

To the contrary, Petitioner addressed to the Board a full-dress argument premised on the lengths to which the "Courts have gone . . . in defining an employer's right to conduct his business" (Petitioner's Brief To Trial Examiner, p. 27).